Supreme Court, U. S.
FILED
APR 21 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

October Term, 1978

No. 78-1434

REX ALLEN WILSON,

Petitioner,

-vs-

STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

GEORGE C. SMITH
Prosecuting Attorney
Franklin County, Ohio
Hall of Justice
369 South High Street
Columbus, Ohio 43215
614/462-3555

and

ALAN C. TRAVIS
Assistant Prosecuting Attorney

Counsel for Respondent

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

INDEX

Opinions Below 1
Jurisdiction 1
Questions Presented for Review 1
Statement of the Case 2
Argument 5
Conclusion 9
Certificate of Service 10
Appendix 11

CITATIONS

Bird v. *Hueston*, 10 Ohio State 418 (1859) 7
California v. *Green*, 399 U.S. 149 (1970) 7
Chambers v. *Mississippi*, 410 U.S. 284 (1973) ... 7
Kahn v. *Flood*, 550 F. 2d 784 (2nd Cir., 1977) ... 6
Neighbors v. *State*, 121 Ohio State 525 (1930) ... 7
State v. *Williams*, 43 Ohio State 2d 88 (1975) 7
United States v. *Bagley*, 537 F. 2d 162 (5th Cir., 1976) 7
United States v. *Goodlow*, 500 F. 2d 954 (8th Cir., 1974) 7
United States v. *Luna*, 525 F. 2d 4 (6th Cir., 1975) 6
United States v. *Marihart*, 492 F. 2d 897 (8th Cir., 1974) 6
United States v. *Rosenbarger*, 536 F. 2d 715 (6th Cir., 1976) 6
United States v. *Scherer*, 523 F. 2d 371 (7th Cir., 1975) 6
United States v. *Taxe*, 540 F. 2d 961 (9th Cir., 1976) 6
United States v. *Ventresca*, 380 U.S. 102 (1965) 5
20 *American Jurisprudence*, Evidence 556, p. 467 7
Federal Rules of Evidence, Rule 804(b)(3) 7
Jones on Evidence, 4th Ed., Vol. I, 324, p. 602 ... 7
McCormick on Evidence, 255, p. 549 7

IN THE

Supreme Court of The United States

October Term, 1978

No. 78-1434

REX ALLEN WILSON,
Petitioner,

-vs-

STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for Franklin County, Ohio is adequately set out in the petition. The judgment of the Ohio Supreme Court declining a motion for leave to appeal is adequately set out in the petition.

JURISDICTION

Jurisdiction is adequately set forth in the petition, 28 U.S.C. §1257(3).

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A SEARCH WARRANT AFFIDAVIT WHICH CONTAINS AN OVERWHELMING AMOUNT OF INFORMATION CONSTITUTING PROBABLE CAUSE IS VITIATED BY A GOOD FAITH UNINTENTIONAL ERROR IN REFERRING TO ONE OF THE SEVERAL NAMED SOURCES OF INFORMATION AS HAVING PERSONAL

KNOWLEDGE OF A FACT RATHER THAN HEARSAY KNOWLEDGE OF THAT FACT.

II. WHETHER A STATE MAY ADOPT THE DECLARATION AGAINST PENAL INTEREST OF A DECLARANT SHOWN TO BE UNAVAILABLE AS AN EXCEPTION TO THE HEARSAY RULE.

STATEMENT OF THE CASE

On March 23, 1977, petitioner was indicted by the Franklin County, Ohio Grand Jury for the purposeful aggravated murders of Peter Cantu and David Bopp, in violation of Ohio Revised Code, Section 2903.01. Petitioner waived trial by jury. The case was tried to a three judge panel which found petitioner guilty on June 7, 1977. An appeal as of right was taken to the Court of Appeals of Ohio, Tenth Appellate District. That court affirmed by unanimous decision, June 27, 1978. A motion for leave to appeal to the Ohio Supreme Court was overruled on October 20, 1978. On April 3, 1979, in conformity with this Court's decision in *Lockett* v. *Ohio*, 438 U.S. ———— (1978), the Court of Common Pleas, Franklin County, Ohio vacated the death sentence and reduced the sentence to life imprisonment. (Appendix, p. 11)

The bodies of the victims were discovered on March 13, 1977, after a neighbor arrived at the home. Victim Cantu was on a couch in the living room with a blood-stained sleeping bag over his head. Victim Bopp was found in a second floor bedroom which showed signs of a struggle. No money or wallets were found. Each victim had been shot four times in the head. The pathologist testified that there were no wounds in

Cantu's head which could have caused bleeding other than the four bullet wounds. A live round of .22 caliber ammunition and a spent .22 caliber cartridge case were found by Bopp's body.

Pursuant to a search warrant, two .22 caliber revolvers plus ammunition, seven wallets, two hundred dollars in cash, cocaine, marijuana and a white T-shirt were seized from petitioner's house. A ballistics expert testified one of the revolvers could have been the murder weapon but due to distortion of the bullets, a conclusive opinion could not be given.

Tom Tweed visited Cantu during the early morning hours of March 12, 1977. He observed four pounds of marijuana packaged in zip-lock bags, a bag of cocaine and Cantu's hand-tooled leather wallet. Three other friends of victim Cantu arrived at the home at 1:30 p.m. on March 12, 1977. Cantu was on the couch, bleeding about the head. Victim Bopp was kneeling beside the couch. Petitioner was standing by the couch. Petitioner told the three visiters that Cantu had fallen, hitting his head and that he, petitioner, had called an emergency vehicle. Petitioner advised the three to leave if they had any illicit drugs in their possession.

One of the three victims, Victor Loeffel, had transferred four one pound zip-lock bags of marijuana and a quantity of cocaine to victim Cantu on the night before the murders.

Other witnesses testified that petitioner produced a total of four pounds of marijuana on March 12, 1977, after the murders. Between three-thirty and four o'clock p.m., on March 12, petitioner divided one pound of marijuana with Harold Fraker. Between four and five o'clock, petitioner sold one pound of marijuana to Kenneth Moder. Moder had called peti-

tioner at eleven o'clock a.m. on March 12 and ordered a pound of marijuana. Petitioner advised Moder he would obtain the marijuana and deliver it. At five o'clock p.m. on March 12, petitioner left two and a half pounds of marijuana with George Dingledine.

Petitioner had purchased two boxes of .22 caliber ammunition from a gun store on March 11, 1977. The hand tooled leather wallet found at petitioner's home was identified by a witness as belonging to victim Cantu. Darrell Smith, an associate of both petitioner and victim Cantu, testified that Cantu regularly "fronted" or transferred marijuana to buyers with payment to be forthcoming. Smith related a March 1, 1977 statement by victim Cantu that Cantu had "fronted" marijuana to petitioner and was owed sixteen hundred dollars.

David Diehl, acquainted with both Cantu and petitioner, was present in January or February when Cantu supplied petitioner five pounds of marijuana with petitioner owing Cantu fifteen hundred fifty dollars for the sale.

Petitioner testifying on his own behalf, admitted being present at the victim's home between one thirty and one forty-five p.m. on March 12 and that Cantu was lying on the couch with blood on his head. Petitioner stated the victim Bopp had called an ambulance. He agreed that three persons (including Loeffler) had arrived and left after which he left. Petitioner denied owing Cantu sixteen hundred dollars, stating the amount was fifteen hundred and were related to the five pound transaction in February. He admitted that he had no money with him when he was at Cantu's at one thirty p.m. and that he had over seven hundred dollars with him at Kenneth Moder's house at five p.m.

He claimed ownership of the hand tooled leather wallet and explained the blood on his pants as being from a minor cut on his wrist occurring in a traffic accident. The investigating traffic officer noted no injuries and no complaint of injuries by petitioner.

ARGUMENT

I

A GOOD FAITH ERROR IN A SEARCH WARRANT AFFIDAVIT DOES NOT REQUIRE SUPPRESSION OF EVIDENCE SEIZED THEREUNDER WHEN THE ERROR IS NEITHER INTENTIONALLY NOR RECKLESSLY MADE AND THE REMAINDER OF THE AFFIDAVIT CONTAINS SUFFICIENT INFORMATION TO CONSTITUTE PROBABLE CAUSE.

Warrants are to be examined in a common sense and realistic fashion. *United States* v. *Ventresca*, 380 U.S. 102 (1965). Probability, not a prima facie case or proof necessary to convict, remains the test for the issuing magistrate.

The affidavit recited facts known to police. Both victims died of gunshot wounds. Recovered bullets were .22 caliber. The time of death was the afternoon of March 12, 1977. A named witness, present at the time, observed one victim bleeding from the head. The second victim was present as was the petitioner. The witness passed a polygraph examination. Named witnesses knew one victim was engaged in illicit narcotics transactions. The named witnesses assisted police in

preparation of a composite drawing of the person at the scene, petitioner. Probable cause existed for issuance of the search warrant.

Petitioner's single complaint is that the affidavit erroneously stated that named witness Smith was present when Cantu met petitioner on March 8, 1977 to discuss a drug sale indebtedness, rather than that Cantu related that fact to Smith. The affiant understood Smith to state he was present when victim Cantu met petitioner. Both the trial court and the Ohio Court of Appeals found the error to be inadvertent. Petitioner has not claimed the error to be intentionally or recklessly made and conceded in the Ohio Court of Appeals that the warrant could have been based on the information in question if properly characterized as hearsay. (Opinion of the Court of Appeals, Appendix to Petition, pages 34-35)

A good faith error in a carefully prepared search warrant affidavit does not require suppression of evidence. *United States* v. *Luna*, 525 F. 2d 4 (6th Cir., 1975); *United States* v. *Marihart*, 492 F. 2d 897 (8th Cir., 1974); *United States* v. *Scherer*, 523 F. 2d 371 (7th Cir., 1975); *Kahn* v. *Flood*, 550 F. 2d 784 (2nd Cir., 1977). In claiming that the exclusionary rule must operate to suppress evidence due to an allegedly false statement in an affidavit, the movant must successfully demonstrate that the erroneous information was presented knowingly or recklessly to deceive the issuing magistrate. *United States* v. *Rosenbarger*, 536 F. 2d 715 (6th Cir., 1976). See also, *United States* v. *Taxe*, 540 F. 2d 961 (9th Cir., 1976).

In view of the clarity and uniformity of decisions cited, it is respectfully submitted that the Writ of Certiorari should not issue on this question.

II

THE HEARSAY RULE DOES NOT EXCLUDE AN OUT OF COURT STATEMENT OF AN UNAVAILABLE WITNESS WHERE SUCH STATEMENT, AT THE TIME OF ITS MAKING, SO FAR TENDED TO SUBJECT THE DECLARANT TO CIVIL OR CRIMINAL LIABILITY THAT A REASONABLE PERSON WOULD NOT HAVE MADE THE STATEMENT UNLESS HE BELIEVED IT TO BE TRUE.

The traditional common law rule regarding declarations against interest has long been followed in Ohio. *Bird* v. *Hueston*, 10 Ohio State 418 (1859); *Neighbors* v. *State*, 121 Ohio State 525 (1930). The modern trend has been to include declarations against the penal interest of declarant in the general exception to the hearsay rule. See 20 *American Jurisprudence*, Evidence 556, p. 467; *McCormick on Evidence*, 255, p. 549; *Jones on Evidence*, 4th Ed., Vol. I, 324, p. 602. The penal interest exception to the hearsay rule is recognized in Ohio. *State* v. *Williams*, 43 Ohio State 2d 88 (1975).

The penal interest exception is also recognized in Rule 804(b)(3) of the Federal Rules of Evidence, 28 U.S.C. See, *United States* v. *Goodlow*, 500 F. 2d 954 (8th Cir., 1974); and *United States* v. *Bagley*, 537 F. 2d 162 (5th Cir., 1976).

Although the hearsay rule and the Confrontation Clause generally protect similar values, the overlap is not complete. *California* v. *Green*, 399 U.S. 149 (1970). See also, *Chambers* v. *Mississippi*, 410 U.S. 284 (1973).

The statement of the declarant (victim Cantu) that he had sold a large quantity of marijuana to petitioner was corroborated by testimony of witness Diehl who was present when Cantu supplied petitioner with five pounds of marijuana on credit. The transaction is aggravated trafficking in drugs under Ohio law.

In view of the recognition accorded the penal interest exception to the hearsay rule by decisions of this Court and the several other jurisdictions cited, it is respectfully submitted that the Writ of Certiorari should not issue on this question.

CONCLUSION

No unreasonable search was conducted pursuant to the warrant. The magistrate was presented with sufficient information from both the personal knowledge of police investigators and from named civilian witnesses to support a finding of probable cause. A concededly unintentional error in a carefully prepared search warrant affidavit is not grounds to suppress evidence.

Neither the hearsay rule nor the Confrontation Clause preclude admission of a statement of an unavailable witness which, at the time made, so far tended to subject the declarant to criminal liability that a reasonable person would not have made the statement unless true.

It is respectfully submitted that in light of the decisions of this Court and those courts of the several jurisdictions cited within, that the Writ of Certiorari should not issue.

Respectfully submitted,

GEORGE C. SMITH
Prosecuting Attorney
Franklin County, Ohio
Hall of Justice
369 South High Street
Columbus, Ohio 43215
614/462-3555

and

ALAN C. TRAVIS
Assistant Prosecuting Attorney

Counsel for Respondent

CERTIFICATE OF SERVICE

Pursuant to Rule 33(3)(b) of the Rules of Practice of the Supreme Court, the undersigned, a member of the bar of the Supreme Court of the United States, hereby certifies that three (3) copies of the foregoing brief in opposition to the petition for a writ of certiorari were served upon M. Claude Sharf, 3435 East Livingston Avenue, Columbus, Ohio 43227, this 17th day of April, 1979, by United States mail, postage paid, and that all parties required to be served, have been served.

Alan C. Travis

ALAN C. TRAVIS
Assistant Prosecuting Attorney
Counsel for Respondent

APPENDIX

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

Case No. 77CR-03-742

State of Ohio,

Plaintiff,

-vs-

Rex Allen Wilson,

Defendant.

JUDGMENT ENTRY

The Court coming now to consider the judgment of the Supreme Court of the United States in *Lockett* v. *Ohio*, 438 U.S. ———, 98 S. Ct. 2954 (1978), and in conformity with the mandate issued on the basis thereof, hereby orders that the judgment and sentence of death is modified and reduced to life imprisonment. It is further ordered that the Clerk of this Court issue a certified copy of this entry to the Superintendent of the Southern Ohio Correctional Facility who shall acknowledge receipt thereof. Credit for pre-trial confinement, from March 16, 1977, ORC §2967.191.

THOMPSON, JUDGE

Filed April 3, 1979